IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE SEVENTEENTH DAY OF MARCH
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE M.H.S. ANSARI

and
THE HON'BLE MR JUSTICE T.CH.SURYA RAO

WRIT PETITION NO : 4650 of 2005

Between:

Kumar's Cotex Limited, Regd. Off: Dokiparru Village, Medikonduru Mandal, Guntur District, Rep. by its Managing Director, Sri Anil Kumar Aggarwal.

..... PETITIONER

AND

1 The Additional Commissioner, O/o. Customs & Central Excise, C. R.

Buildings, Kannavarrithota, Guntur.
2 The Assistant Commissioner, O/o. Customs & Central Excise,
Guntur Division, 2/17, Brodipet, Guntur.
3 The Superintendent of Central Excise, Range-II, 2/17, Brodipet, Guntur.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ, order or direction more particularly one in the nature of WRIT OF CERTIORARI calling for the records pertaining to the adjudication orders passed by the 1st Respondent dt. 24-12-2004 and consequential Detention orders dt. 7th February 2005 passed by 3rd Respondent (Superintendent) pursuant to the orders of the 2nd Respondent dt. 7-2-2005 and quash the same being illegal, arbitrary, violative of Principles of Natural Justice and contrary to Articles 14, 19(1)(g) of the Constitution of India.

Counsel for the Petitioner: Mr.Hidayatulla, Senior Counsel, MR.K.V.SIMHADRI, Advocate.

Counsel for the Respondents: MR.A.RAJASHEKAR REDDY (ASST.SOLICITOR GEN.)

The Court made the following :

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THE HON'BLE SRI JUSTICE M.H.S.ANSARI

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AND

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THE HON'BLE SRI JUSTICE T.Ch.SURYA RAO

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W.P.NO.4650 OF 2005

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ORDER: (Per the Hon'ble Sri Justice T.Ch.Surya Rao)

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The petitioner seeks to assail the adjudication order dated 24-12-2004, passed by the learned Additional Commissioner, Customs & Central Excise, Guntur, and the consequential detention order dated 07-02-2005 passed by the 3rd respondent and seeks in connection therewith a writ of *Certiorari*.

2. The petitioner is a public limited company having been incorporated under the provisions of the Companies Act, 1956. Its main activity is manufacturing of cotton yarn and this is 100% export oriented unit. The company started its commercial production on 04-07-2000. On account of its financial constraints the company had to approach the Board for Industrial & Financial Reconstruction (BIFR), New Delhi. Subsequently, it sought permission for clearing the manufactured goods under domestic tariff area. The petitioner was accordingly permitted to clear the goods

under DTA sales fixing the limit at Rs.950 lakhs in the month of June 2003.

3. On gathering intelligence that the petitioner company was affecting clearances without payment of excise duty, the premises of the company were inspected on 29-07-2003 and scrutinized its record. At the same time, after having noticed that the petitioner did not discharge the duty liability on the cotton yarn and cotton waste cleared by it to DTA, certain records were seized. It was followed up by the first show cause notice dated 28-07-2004 calling upon the petitioner to show cause as to why an amount of Rs.48,44,453/- should not be demanded in recovery from the petitioner, and then the second show cause notice dated 03-08-2004 calling upon the petitioner to show cause as to why an amount of Rs.1,40,07,854/- should not be demanded and finally third show cause notice dated 09-12-2004 to show cause as to why an amount of Rs.3,70,52,617/- should not be demanded and recovered from the petitioner for the period in between 04-07-2000 and 30-07-2003. Pursuant to the said notices, the petitioner submitted his written explanations. Sometime thereafter, when a personal hearing was given to the petitioner on 07-12-2004, it was submitted that by letter dated 18-11-2004 the petitioner requested for Photostat copies of certain documents, which were seized by the Department on the premise that for making necessary further submissions they were required. It is now the grievance of the petitioner that without supplying the copies of those documents, which in its view are relevant material for putting forth its case effectively to meet the allegations in the show cause notices, the impugned order dated 24-12-2004 was passed followed up by, as aforesaid, the detention order dated 07-02-2005.

4. It is the case of the petitioner that the ground mentioned, *inter alia*, in the impugned order that the copies of the documents required are not relevant and they have been requested at the eleventh hour, without any connection to the issue under examination and only sought for with intent to delay the present proceedings, is not correct and it is a case where the principles of natural justice have been violated. It is the further case of the petitioner that under the impugned order, the authorities should have drawn an adverse inference for non-supply of the documents and, therefore, the order in question is vitiated.

5. We have heard the learned senior counsel Sri Hidayatullah. It is the representation of the learned senior counsel that notwithstanding the fact that appeal lies against the impugned order and as a matter of that the petitioner has been making preparations for preferring an appeal, but still it becomes an empty formality

inasmuch, as the first appellate authority has no power to remit the matter for fresh consideration, and the documents which are very much germane for consideration cannot be obtained for placing before the appellate authority, and consequently there cannot be any effective adjudication of the matter.

6. The learned senior counsel further represents that it is a clear case where the documents were seized under an acknowledgment. The authority cannot deny the custody thereof and when the documents were sought to be suppressed an adverse inference clearly could have been drawn by the adjudication officer, and in having failed to do so he committed a serious illegality by passing the impugned order. To buttress the above contentions the learned senior counsel seeks to place reliance on the judgments in SUNDER ISPAT LIMITED Vs. COMMISSIONER OF CUS. & C.EX., HYDERABAD, SOUTHERN STEEL LTD., HYDERABAD vs. UNION OF INDIA AND OTHERS , U.P.STATE v. MOHD. NOOH and BABURAM v. ZILA PARISHAD. We will advert to the said submission sought to be made by the learned senior counsel placing reliance upon these four judgments, a little later at the appropriate stage.

7. Following facts need to be noticed for brevity and better understanding of the matter.

Admittedly, the petitioner company is 100% export oriented unit and was permitted to manufacture carded cotton yarn and combed cotton yarn by means of a letter dated 30-09-1992 by the Government of India, Department of Industrial Development. The petitioner started production on commercial basis with effect from 04-07-2000. As a result of non-release of working capital and substantial delay in disbursement of loan, the company could not start its production. Obviously, on account of certain financial constraints the petitioner had to approach the BIFR, New Delhi under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Presumably, on account of those constraints the petitioner sought for domestic tariff area clearances and permission was accorded for clearance of the goods manufactured on domestic tariff area basis, of course, with a ceiling limit of Rs.950 lakhs in the month of June 2003.

8. It is now the case of the Department that under the guise of the said permission for clearance of the goods under DTA scheme the petitioner cleared the goods under various invoices in excess of the permission granted to it by the Development

Commissioner, VEPZ, and thereby caused loss to the revenue when having failed to pay the necessary excise duty.

9. On the other hand, the case of the petitioner is that in fact it addressed a letter to the authority concerned seeking permission to clear the goods in excess of the limit granted earlier and the same was pending consideration.

10. Hence, the fact remains that there has been excess clearance of the goods than the requisite permit granted to the petitioner. Under those circumstances, the show cause notices enumerated hereinabove have been issued demanding payment of the excise duty with necessary penalty etc.

11. There can be no quarrel in the proposition of law that the present writ petition can be maintained notwithstanding the fact that the petitioner has an efficacious alternative remedy of filing an appeal before the appropriate authority. In that view of the matter, the decisions sought to be relied upon by the learned senior counsel in U.P.STATE's case (3 supra) and BABURAM's case (4 supra) need no reference.

12. Admittedly, the petitioner has been making preparations to prefer the appeal before the first authority. But, it is the case of the petitioner that such an attempt becomes an empty formality inasmuch as the appellate authority has no power to remit the matter to the primary authority for fresh consideration after affording necessary and reasonable opportunities to the petitioner to submit the documents, when supplied. In this connection, it is the contention of the learned senior counsel that the adjudicating authority, which passed the impugned order, ought not to have denied or refused for summoning the documents and supplying copies thereof sought for by the petitioner before adjudicating. The decision of this Court in SUNDER's case cited (1) supra, on a perusal of the facts makes it clear that the stage at which the petitioner sought for the documents appears to be a pre-adjudication stage. This court having been of the view that the documents are relevant and squarely supports the case of either the prosecution or the defence and that no adjudicating authority could refuse production of such documents only on the ground that they would be of no use to the prosecution and the refusal of a document on that account would certainly amount to refusal of reasonable opportunity to the defence and against the fair play.

13. This aspect of the matter had been dealt under the impugned order at paragraph 20 by the learned adjudicating authority and mentioned, *inter alia*, that during the course of personal hearing on 07-12-2004 the consultant appeared on behalf of the petitioner and made written submissions and reiterated the same that he also stated that the petitioner-unit vide its letter dated 18-11-2004 requested for copies of certain documents, which were seized by the department as the same were required for making further submissions. Accordingly, he was permitted to obtain the same on 08-12-2004 and 09-12-2004.

14. Again in paragraph 23 of its order the adjudication authority was of the view as under:

> "Before I proceed to consider the above points for decision I observe that M/s.KCL wanted certain records for filing further submissions and the said records are not readily available. In this connection, it is clear that the documents requested by M/s.KCL are neither relied in the show-cause notice nor they have relevance to the issue under examination. In view of the above, I take up the adjudication of the case, without waiting for the furnishing of records, which have been requested at the eleventh hour and that too without any connection to the issue under examination, seemingly with the intent to delay the present proceedings."

15. The correctness or otherwise of the decision is not a matter germane for consideration in the instant writ petition. As a matter of that, we are not sitting in appeal over the impugned order passed by the first authority. Obviously, the authority has adverted to the request of the petitioner and rejected the same in its own way by assigning reasons. At that stage when opportunity was given to the petitioner to obtain the said documents on 08-12-2004 and 09-12-2004, the petitioner could have approached this Court invoking its extraordinary jurisdiction under article 226 of the constitution of India. On the other hand, it is a case where the petitioner submitted written arguments and an opportunity of personal hearing was given when the petitioner concluded his submissions by reiterating the same, therefore, in our considered view, the petitioner cannot legitimately complain violation of principles of natural justice. Admittedly, the petitioner has an efficacious alternative remedy of filing an appeal. Indeed the case of the petitioner is that it is prepared to file the appeal. Such a contention can validly set-forth before the authority when the petitioner files his appeal.

16. Apropos the contention, that appeal is an empty formality inasmuch as the

appellate authority cannot remit the matter to the primary authority for affording opportunity to the petitioner and for supply of documents and no purpose would be served, the learned senior counsel seeks to place reliance upon a bench judgment of this court in SUNDER's case (1) supra. Further more the learned senior counsel invited our attention to the amended provisions of Section 35 of the Central Excise Act. A perusal of the said provision shows that the first appellate authority has no power to remit the matter to the primary authority for fresh consideration. That does not mean that the appellate authority has no power to give an opportunity to the petitioner either by calling for the records which are relevant or giving an opportunity to the petitioner himself to get at those documents and produce the same. The first appellate authority can take up the matter effectively on its own merits by providing post decisional opportunity to the petitioner. In the process it is also open to the first appellate authority to draw the necessary adverse inference as sought to be canvassed by the learned senior counsel before us. Therefore, we are afraid that the petitioner cannot legitimately canvass before us that the first appeal becomes an empty formality and no useful purpose will be served by preferring such an appeal and the petitioner is represented to have been making necessary arrangements for filing such appeal. We are afraid that it cannot legitimately be canvassed on account of non-supply of the documents, the order *per se* becomes illegal and without jurisdiction, which attracts the extraordinary jurisdiction of this Court under article 226 of the constitution of India. We are not able to persuade ourselves with the contention of the learned senior counsel that it is a case of clear violation of principles of natural justice in view of the two excerpts from the impugned order extracted hereinabove. Absence of the power to remit the matter alone cannot precisely be the sole consideration to support the contention that filing of appeal becomes an empty formality when the appellate authority deal with the matter effectively by affording every opportunity.

17. When once the case of the petitioner merits no consideration on the two grounds raised by it, the other consequential order of detention dated 07-02-2005 now sought to be impugned cannot also be assailed legitimately before us for the above reasons. In the event the petitioner prefers an appeal as stated fairly in the writ petition the appellate authority may consider the case of the petitioner on its own merits without being prejudiced or influenced in any way with the observations made by this court, inter alia, in this order, while passing appropriate orders.

18. For the foregoing reasons, we are not inclined to exercise our discretion under article 226 of the constitution of India. Therefore, writ petition fails and is dismissed accordingly. No order as to costs.

M.H.S.ANSARI, J.

T.Ch.SURYA RAO, J.

Dated 17-03-2005.

Skmr

To

1 The Additional Commissioner, O/o. Customs & Central Excise, C. R.

Buildings, Kannavarrithota, Guntur.

2 The Assistant Commissioner, O/o. Customs & Central Excise,
Guntur Division, 2/17, Brodipet, Guntur.

3 The Superintendent of Central Excise, Range-II, 2/17, Brodipet, Guntur.

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